

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Criminal Application (APL) No. 393 of 2021

APPLICANT: Dr. Sameer Narayanrao Paltewar,
Aged 51 years, Occupation : Medical
Practitioner – Neuro Surgeon,
Resident of 502, Le-Prestige, 105-106,
Farmland, Ramdaspath, Nagpur – 440
010.

Vs.

RESPONDENT : The State of Maharashtra, through Police
Station Officer, Police Station, Sitabuldi,
Nagpur

Mr. Avinash Gupta, Senior Advocate with Mr. Akash Gupta,
Advocate for the applicant
Mr. S.A. Ashirgade, APP for the respondent
Mr. Shyam Dewani, Advocate and Mr. Sahil Dewani, Advocate
for the intervenor

CORAM : MANISH PITALE, J.

RESERVED ON : JULY 27, 2021

PRONOUNCED ON: AUGUST 21, 2021

JUDGMENT

Heard finally.

2. What is the fate of an accused in the State of Maharashtra who is directed to remain present in the Sessions Court pursuant to a direction under Section 438(4) of the

Code of Criminal Procedure, 1973 (Cr.P.C.) and his application for anticipatory bail is rejected? Is he not exposed to immediate arrest, as the interim protection operating during pendency of the application vanishes with the dismissal of the application? Is he then not deprived of opportunity to move the High Court for grant of anticipatory bail by invoking the concurrent jurisdiction of the High Court under Section 438 of the Cr.P.C.? These are the questions that fall for consideration in the present application.

3. The applicant before this Court contends that appropriate directions are required from this Court in the context of Section 438(4) of the Cr.P.C., Maharashtra Amendment, so as to ensure that the very remedy of pre-arrest bail or anticipatory bail is not frustrated when the Sessions Court directs the accused to remain present under the said provision at the time of final hearing of the application for anticipatory bail. The contention is that when the presence of the accused is insisted upon under Section 438(4) of Cr.P.C., in the eventuality of the application for anticipatory bail being rejected, interim protection needs to be extended for a reasonable time, so that the accused is not deprived of the opportunity to knock the doors of the High

Court to seek anticipatory bail, as the High Court exercises concurrent jurisdiction in the matter. The submission is that in the absence of any such direction, the moment an anticipatory bail application of an accused is rejected and the applicant (accused) is obliged to remain present before the Sessions Court pursuant to direction under Section 438(4) of Cr.PC., there is every possibility of the Investigating Officer arresting the accused then and there, as a result of which, the accused would stand deprived of approaching the High Court, thereby frustrating the very remedy available under Section 438 of Cr.PC.

4. The applicant before this Court is a Nero Surgeon, practicing since 1999, who has worked as a Lecturer in Sion Hospital at Mumbai and who has been instrumental in establishing the Neuro Science Department of a Super Specialty Hospital at Nagpur. The complainant and the applicant are the Directors of a company operating the said Hospital and the complainant has lodged a criminal complaint, due to disputes that have arisen, bearing Crime No. 77/2021 against the applicant for offences punishable under Sections 406, 409, 420, 465, 467, 468 and 471 of the Indian Penal Code (IPC) and Section 66-C of the Information

Technology Act, 2000.

5. The applicant filed an application for grant of anticipatory bail before the Sessions Court, wherein on 22/02/2021, ad-interim protection was granted in favour of the applicant and he was told to co-operate with the investigation. Upon notice being issued in the said application, the Public Prosecutor appeared in the matter and a counsel also represented the complainant to assist the Prosecutor. The applicant states that the counsel representing the complainant applied before the Public Prosecutor, seeking a direction for personal presence of the applicant at the time of final hearing of the anticipatory bail application. Thereafter, the Investigating Officer and the Prosecutor moved applications seeking presence of the applicant in the Court at the time of final hearing of the anticipatory bail application. On 05/03/2021, the Court of Additional Sessions Judge-6, Nagpur, allowed the applications and directed the applicant to remain present in the Court at the time of final hearing of the application for anticipatory bail.

6. Aggrieved by the same, the applicant filed the present application, wherein this Court passed an order on

09/03/2021, admitting the application and recorded the aforesaid contentions raised in the matter pertaining to the scope and amplitude of Section 438(4) of Cr.P.C. as applicable to the State of Maharashtra. Interim order was passed in favour of the applicant to the effect that if the Sessions Court rejected the anticipatory bail application, the interim protection operating in favour of the applicant would continue for a period of 72 hours, to enable him to approach this Court. The complainant filed an intervention application and appeared through counsel. The public Prosecutor represented the State.

7. Mr. Avinash Gupta, learned Senior Counsel appearing along with Mr. Akash Gupta, learned Counsel for the applicant, submitted that the power to grant anticipatory bail under Section 438 of Cr.P.C. is exercised concurrently by the Sessions Court and this Court. It was submitted that Sub-section (4) to Section 438 of Cr.P.C. as applicable to the State of Maharashtra, creates a situation that when the Court directs presence of the applicant (accused) in the Court on an application moved by the Prosecutor, unless there is an order granting interim protection from arrest to the applicant, there is every possibility of the applicant being arrested on his

remaining present in the Court, thereby frustrating the very right available under the said provision. It is submitted that this Court, to address the said situation, has repeatedly held that when the Sessions Court exercises its power under Section 438(4) of Cr.P.C. directing the accused to remain present in the Court at the stage of final hearing, there has to be interim protection from arrest in favour of the accused. In other words, it is already held by this Court that the direction to the accused to remain present in the Court by exercising power under Section 438(4) of Cr.P.C., can be granted only when interim protection is already operating in favour of such an accused.

8. But, the learned Senior Counsel submits that the applicant in the present case seeks to highlight the plight of an accused when he remains present in the Court at the stage of final hearing of the application for grant of anticipatory bail while interim protection is operating. In the eventuality that the application is rejected upon final hearing, unless protection is extended further for a reasonable period of time to approach the High Court for grant of anticipatory bail, the accused stands exposed to the possibility of arrest. As a result, in the event of his immediate arrest, he is deprived of an

opportunity to move the High Court, having the consequence of frustrating the right available under Section 438(4) of Cr.P.C. to move the High Court for consideration of his prayer for grant of anticipatory bail. The learned Senior Counsel submits that the Maharashtra Amendment to Section 438 of Cr.P.C., incorporating sub-section (4) therein, ought to be read in such a fashion that it operates in the interest of justice and in the interest of the prosecution as well as the accused. It is submitted that the Court can continue the conditions imposed for grant of interim protection during pendency of the application before the Sessions Court or the Court can impose further conditions also, while extending the interim protection for a reasonable period of time, in the interest of justice. The learned Senior Counsel emphasized that the expression “interest of justice” used in Section 438(4) of the Cr.P.C. as applicable to the State of Maharashtra, ought not to be interpreted in a narrow fashion to mean only the interest of prosecution, but also to take care of the interest of the accused.

9. The learned Senior Counsel relied upon judgments of the Hon’ble Supreme Court in the cases of **Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab (1980) 2 SCC**

565, **Sushila Aggarwal and Others Vs. State (NCT of Delhi) and Another (2020) 5 SCC 1** and judgment and order dated 04/12/2009, passed by this Court in Criminal Application No. 5307 of 2009 (**Ashik Rameshchandra Shah and Others Vs. State of Maharashtra**). The learned Senior Counsel specifically relied upon the 203rd Report of the Law Commission of India on the subject of amendment to Section 438 of the Cr.P.C. By referring to the relevant portions of the said judgments and the aforesaid Report of the Law Commission, the learned Senior Counsel emphasized that this Court ought to give appropriate directions so that Section 438(4) of the Cr.P.C., as applicable to the State of Maharashtra, operates in furtherance of justice and the interpretation that frustrates the very right provided under Section 438 of the Cr.P.C., is eschewed.

10. Mr. S.A. Ashirgade, learned APP appeared on behalf of the respondent – State and submitted that the apprehension expressed on behalf of the applicant that in the absence of interim protection being continued, there was distinct possibility of the accused being arrested upon rejection of the application for anticipatory bail by the Sessions Court, could not be said to be unjustified. The

learned APP further submitted that there can be no doubt about the fact that the Sessions Court and High Court do exercise concurrent jurisdiction insofar as Section 438 of Cr.P.C. is concerned. But, attention of this Court was invited to judgment of the Division Bench of this Court in the case of **Abdul Razzak Abdul Sattar and Anr. Vs. State of Maharashtra and Ors.**, judgment and order dated 19/07/2011, passed in **Criminal Writ Petition No. 355 of 2011**, wherein the aforesaid specific provision i.e. under Section 438(4) of the Cr.P.C. applicable to the State of Maharashtra, was challenged on the ground that it violated Articles 14 and 21 of the Constitution of India. It was submitted that by the said judgment, a Division Bench of this Court rejected the challenge raised to the validity of Section 438(4) of the Cr.P.C. It was specifically held that the said provision could not be said to violate Article 21 of the Constitution of India. On this basis, it was submitted that the direction given in the present case by the impugned order dated 05/03/2021, by exercise of power under Section 438(4) of the Cr.P.C., could not be said to be improper on the part of the Sessions Court. The learned APP submitted that the contents of the 203rd Report of the Law Commission could not be disputed and this Court may pass appropriate directions in the context of the apprehension

expressed by the learned Senior Counsel appearing for the applicant (accused), in the interest of justice.

11. Mr. Sahil Dewani, learned counsel appearing for the intervenor (original informant), submitted that the present application was rendered infructuous in view of the fact that this Court had granted interim relief to the applicant by directing that if the Sessions Court passed any adverse order of rejection of anticipatory bail, the interim protection operating in favour of the applicant would continue to operate for further period of 72 hours to enable the applicant to approach this Court. On this basis, it was submitted that the present application had served its purpose. On the specific contentions raised on behalf of the applicant, the learned counsel appearing for the intervenor also relied upon the aforesaid Division Bench judgment in the case of **Abdul Razzak Abdul Sattar and Anr. Vs. State of Maharashtra and Ors.** (supra). In fairness, the learned counsel for the intervenor also referred to the judgment of this Court in the case of **The State of Maharashtra Vs Kachrusingh Santaramsingh Rajput and another (1994) 3 Bom CR 348**, wherein this Court had an occasion to comment upon the apprehension expressed on behalf of the applicant.

12. Having heard the learned counsel appearing for the rival parties, this Court is called upon to consider as to whether appropriate directions need to be given in order to address the apprehension of the accused in the State of Maharashtra in the context of Section 438(4) of the Cr.P.C. This Court needs to consider as to whether the accused is entitled for appropriate directions, extending the interim protection operating during pendency of the anticipatory bail application before the Sessions Court, for a reasonable period, in the event the application is rejected upon final hearing, so as to enable the applicant to approach the High Court by invoking concurrent jurisdiction under Section 438 of the Cr.P.C.

13. This Court is of the opinion that even though in the present case the applicant was granted interim relief, the issue raised on behalf of the applicant is recurring and that it needs to be decided on merits. Before considering the rival arguments and the relevant material produced before this Court, it would be appropriate to reproduce the aforesaid provision, as applicable in the State of Maharashtra.

“Substitution of section 438 of Act 2 of 1974 :-
For section 438 of the Code of Criminal

Procedure, 1973 (2 of 1974), in its application to the State of Maharashtra, the following section shall be substituted namely :-

438. Direction for grant of bail to person apprehending arrest. – (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail; and High Court may, after taking into consideration, *inter-alia*, the following factors :-

- (i) The nature and gravity or seriousness of the accusation as apprehended by the applicant;
- (ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court previously undergone imprisonment for a term in respect of any cognizable offence;
- (iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested, and
- (iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice, either reject the application forthwith or issue an interim order for the grant of anticipatory bail :

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of, anticipatory bail shall be finally heard for passed on order thereon, as the Court may deem fit; and if the Court passes any order granting anticipatory bail, such order shall include *inter alia* the following conditions, namely

:-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of section 437 as if the bail was granted under that section.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice, being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Commissioner of Police, or the as the case may be, the concerned Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of the final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(5) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order made under sub-section (1).”

14. It is evident from a perusal of sub-section 4 of Section 438 of the Cr.PC., as applicable to the State of Maharashtra, quoted above, that if the Public Prosecutor moves an application seeking presence of the applicant

(accused), before the Court at the time of final hearing of an application for anticipatory bail and the Court considers such presence necessary and in the interest of justice, it becomes obligatory for the accused to remain present before the Court. The physical presence of the applicant (accused) before the Court at the stage of final hearing obviously exposes him to arrest, the moment his application for anticipatory bail is dismissed upon final hearing. It is obvious that the moment the applicant (accused) is arrested, his right to move the High Court under Section 438 of Cr.P.C., invoking the concurrent jurisdiction vested in the High Court stands forfeited and frustrated.

15. There can be no doubt about the fact that the Sessions Court as well as the High Court exercise concurrent jurisdiction, insofar as applications under Section 438 of the Cr.P.C. are concerned. This is because, the words used in the above quoted provision are “he may apply to the High Court or the Court of Sessions for a direction under this Section ...”. The Law Commission of India in the aforementioned 203rd Report has also deliberated upon the said concurrent jurisdiction of the Sessions Court and the High Court in the matter of applications under Section 438 of the Cr.P.C. and

commented upon the then proposed amendment in Section 438 of the Cr.P.C., which ultimately did not fructify in the Cr.P.C., as generally applicable, but, nevertheless found its way in the said provision as applicable to the State of Maharashtra. Thus, it is an undeniable fact that the Sessions Court as well as the High Court exercise concurrent jurisdiction, insofar as applications for anticipatory bail under Section 438 of the Cr.P.C. are concerned.

16. By now, it is also a settled position of law, as referred in the aforesaid 203rd Report of the Law Commission of India submitted in December 2007, that an accused is expected to first approach the Sessions Court to seek anticipatory bail and if an adverse order is passed, to then approach the High Court, seeking anticipatory bail under Section 438 of the Cr.P.C. Therefore, this two stage process of exercising right to move the Sessions Court initially and then the High Court for seeking anticipatory bail under Section 438 of the Cr.P.C., has been recognized.

17. Initially, when the question arose regarding plight of an accused not having interim protection during the pendency of anticipatory bail application before the Sessions

Court and then being directed to appear before the Sessions Court at the stage of final hearing under Section 438(4) of the Cr.P.C., this Court held in various orders that if a direction was to be given to the accused to remain present in Court under Section 438(4) of the Cr.P.C., interim protection ought to be operating in his favour. In the case of **The State of Maharashtra Vs Kachrusingh Santaramsingh Rajput** (supra), this Court considered the aforesaid aspect of the matter and held that the very purpose of introducing Section 438 in the Cr.P.C. and the new form in which it was brought into force in the State of Maharashtra was to strike a balance between the interest of the State to investigate through police into offences according to established procedure of law and the individual liberties of a person accused of serious crimes. The expression “in the interest of justice” was deliberated upon and it was held that the said expression was not limited to concern for the rights of the accused, but also, the duty of the State to investigate into serious offences in a proper and efficient manner. In the case of **Vijaya Ramesh Ramdasi V. State of Maharashtra, (Criminal Application No. 569 of 2001)**, decided on 20/03/2001, this Court held as follows:

“8. While considering, whether the grant of interim anticipatory bail is sine-qua-non for the Court to order personal presence of the applicant on the date fixed for final hearing, practical effect of

the scheme as a whole must be taken into consideration. In case the applicant is not granted interim anticipatory protection and still the Court directs the applicant to remain present in the Court on the date fixed for final hearing, by virtue of proviso to sub-section (1), it is open for the investigating Officer to effect arrest of the applicant. The direction under sub-section (4), if considered as an independent and irrespective of interim protection, will prove to be a mouse trap and not a protection of personal liberty of the citizen. Being under the Court directions the applicant would be obliged to proceed towards the Court and investigating Officer can wait at the entrance gate of the Court premises.

The proposition of learned APP that sub-section (4) is an independent power and can be exercised without granting interim protection is, therefore, unacceptable, being against the spirit of provision of anticipatory bail, which is believed to be for the purpose of protection of personal liberty guaranteed by the Constitution of India. It must, therefore, be said that the Court entertaining the application for anticipatory bail shall be in a position to insist for personal presence of the applicant, although in the interest of justice on the date fixed for final hearing or on any other date fixed for hearing, provided the applicant is granted protection by interim anticipatory bail. In case sub-sections (3), (4) and (5) are not to be read together in this fashion, by virtue of proviso to sub-section (1) the Court itself shall be indulging into frustrating the petitions.”

18. The observations quoted above are echoed in the order passed by this Court in the case of **Goyappa Jalagiri V. The State of Maharashtra in Criminal Application No. 4370 of 2004, decided on 20/10/2004**, wherein this Court held as follows:

“PC.

1. Heard Counsel for the parties. Perused the record. The Court below, to my mind, has committed manifest error in assuming that provisions of sub sections 3 and 4 of section 438 are independent. Sub sections of Section 438 as applicable to the State of Maharashtra will have to be read conjointly and if so read the scheme appears to be that when the Court insist for appearance of any applicant before the application is finally heard or at any other stage of the hearing of the application, the appropriate course would be to protect the applicant for the limited purpose so as to enable him to appear before the Court. If such limited protection is not extended to the applicant, the applicant would be obviously exposed to the threat of arrest and for which purpose Section 438 has been brought into force. Viewed in this perspective, the Sessions Judge, Sangli, has committed manifest error in proceeding on the assumption that it was not necessary to extend any protection to the applicant as to enable him to appear before the Court. As the court below has not considered any other aspects on merits, to my mind, following order will meet the ends of justice:

(a) The applicant is protected for a period of one week from today to enable him to make fresh application before the Sessions Court at Sangli, who in turn shall decide the same on its own merits in accordance with the law.

(b) That the applicant will not be arrested by the police in connection with the offence registered as C.R. No.6 of 2004 in Umadi Police Station, Sangli. That will not preclude the Investigating Officer to ask the applicant to attend the police station for the purpose of interrogation till the Anticipatory Bail Application is disposed of

Application disposed of accordingly.”

19. This Court has followed the said position in its judgment and order dated 04/12/2009, passed in the case of **Ashik Rameshchandra Shah and Others Vs. State of Maharashtra** (supra). After referring to the said judgments and quoting from the observations made therein, this Court held as follows:

“10. I am, therefore, fortified in my view by virtue of the observations made by the aforesaid three learned Single Judges of this Court on this aspect. Therefore, I am of the view that the learned Sessions Judge clearly erred in directing the applicants to remain present in Court without granting any interim protection in this case.

11. I am informed that the said provision is being used by the prosecution for the purpose of arresting the accused and the Courts, very often, after passing an order under sub-section (4) of section 438 do not grant any interim protection. In my view, it would be appropriate, therefore, to take into consideration the scheme of section 438 that if an application is preferred by the prosecution for the purpose of securing presence of the accused, the Courts, if they want to pass favourable order granting the application in such cases it would be appropriate if some reasons are assigned as to why it feels that presence of the accused is necessary and ordinarily should grant interim protection to the accused so that the prosecution on the pretext of securing presence of the accused does not arrest the accused and make his application infructuous.”

20. The above quoted observations of this Court in the said judgments are in consonance with the law laid down by

the Hon'ble Supreme Court in the case of **Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab** (supra). While deliberating upon the manner in which the right of an accused under Section 438 of the Cr.P.C. is to be exercised, the Hon'ble Supreme Court in the aforesaid judgment held as follows:

“26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi V. Union of India (1978) 1 SCC 248*, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.”

21. Thus, insofar as the apprehension of the accused in the State of Maharashtra in the context of being arrested when directed to remain present under Section 438(4) of the Cr.P.C. before the Sessions Court, has been addressed by the specific observations and law laid down in the abovementioned judgments. The applicant in the present case has highlighted the apprehension even when interim protection is operating during pendency of the anticipatory bail application before the Sessions Court and the said application stands finally rejected. It is contended that when an accused, like the applicant in this application, is directed to remain present by the Sessions Court under Section 438 of the Cr.P.C., the moment his application for anticipatory bail is rejected upon final hearing by the Sessions Court, the interim protection terminates instantly and the accused is exposed to the possibility of arrest, while he is yet to exercise his right to move the High Court in its concurrent jurisdiction under Section 438 of the Cr.P.C. Thus, in the present case, the applicant is seeking appropriate directions, which could be said to be in the nature of a step further than what is already recognized by this Court in the aforementioned judgments.

22. That the said apprehension is real and not

unfounded is supported by the contents of the 203rd Report of the Law Commission of India. The learned Senior Counsel appearing for the applicant is justified in submitting that the Report of Law Commission can be used as an external aid for appropriate interpretation of Section 438(4) of the Cr.P.C., because the said report specifically deliberates upon an identical proposed amendment in the Cr.P.C. as applicable to the entire country. The Hon'ble Supreme Court has held in the case of **Mithilesh Kumari and Another Vs. Prem Behari Khare (1989) 2 SCC 95**, that report of Law Commission of India may be referred to as an external aid to construction of provisions of law. In the said Report submitted in December 2007, the Law Commission of India referred to the origins of the remedy of anticipatory bail incorporated in the Cr.P.C. and thereupon it came to a considered conclusion that the proposed amendment, identically worded as the one found in the Maharashtra Amendment, ought not to be brought into effect and that the same was required to be omitted, in the interest of justice. The Law Commission of India in the said Report has categorically recorded as follows:

“Nevertheless, we are of the view that obligatory presence of the applicant seeking anticipatory bail in compliance with Court's order to that effect will be antithesis to his right to anticipatory bail. We are, therefore, of the considered view that sub-section (1B) should be

omitted from this section.”

23. The Law Commission of India has specifically referred to the concurrent jurisdiction of the Sessions Court and the High Court in the context of exercise of original jurisdiction under Section 438 of the Cr.P.C. and after taking into consideration the said aspect of the matter, it has found that such an amendment, making presence of the accused obligatory, is antithetical to the right of the accused to anticipatory bail. The Law Commission of India has also recorded that it is conscious of the fact that the State Amendment of Maharashtra incorporating sub-section 4 to Section 438 of the Cr.P.C. has already come into effect from the year 1993 and yet, a clear opinion is expressed that such an amendment is an antithesis to the right of anticipatory bail. In its recommendations at para 7.1 of the aforesaid 203rd Report submitted in December 2007, the Law Commission of India has specifically recommended that sub-section 1(B), identically worded to sub-section 4 of Section 438 of the Maharashtra Amendment to the Cr.P.C., must be omitted. It is perhaps for this reason that the such an amendment never found its way in Section 438 of the Cr.P.C., as applicable to the other parts of the country.

24. At this stage, it would be appropriate to refer to the judgment of the Division Bench of this Court in the case of **Abdul Razzak Abdul Sattar and Anr. Vs. State of Maharashtra and Ors.** (supra). By the said judgment, the Division Bench of this Court has repelled challenge raised to the Constitutional validity of sub-section 4 to Section 438 of the Cr.P.C. (Maharashtra Amendment), in the context of Articles 14 and 21 of the Constitution of India. The Division Bench of this Court has specifically held that the aforesaid amendment does not violate Article 21 of the Constitution of India, because the right conferred to the accused under Section 438 of the Cr.P.C. is a statutory right, regulated by certain reasonable restrictions and, therefore, introduction of sub-section 4 to Section 438 of the Cr.P.C. in the Maharashtra Amendment, cannot be said to violate the rights of the accused under Article 21 of the Constitution of India.

25. In the light of the above, this Court is proceeding on the basis that the requirement of sub-section 4 of Section 438 of the Cr.P.C. as applicable to the State of Maharashtra, has to be satisfied by the accused when the Court upon an application of the Prosecutor considers presence of the accused necessary in the interest of justice at the time of final

hearing of the application. This Court in the aforementioned judgments has repeatedly held that such applications cannot be casually moved by the prosecution and they cannot be routinely allowed by the Sessions Court under Section 438(4) of the Cr.P.C. It has been also specifically laid down that such a direction under Section 438(4) of the Cr.P.C. can be issued for the presence of the accused before the Court at the stage of final hearing of the application, only where an interim order of protection from arrest is operating in favour of the accused. As regards the further step whereby the accused can knock the doors of this Court i.e. the High Court to invoke concurrent original jurisdiction under Section 438(4) of the Cr.P.C., this Court in the case of **The State of Maharashtra Vs Kachrusingh Santaramsingh Rajput** (supra), has observed as follows:

“13. Mr. Loya, learned Counsel for the respondents, then, indicated to us three contingencies in which to me guidelines would be necessary in view of the aforesaid view of the matter for the Courts below. They are: -

(i) Where interim relief is not granted by the Court and yet the Court directs the personal attendance of the accused before the Court at the final hearing;

(ii) Interim relief is granted and the Court directs the personal attendance of the accused at the time of final hearing, and;

(iii) If the application for anticipatory bail itself is rejected leaving the applicant / accused without any protection from the Courts.

14. It was submitted that, in these three contingencies if at all the applicant/accused wanted to have some recourse to a higher Court in connection with the relief, then, whether the Court should consider that aspect for giving some breathing time to the applicant/accused, in order to facilitate his approach to a higher Court. The question in which form a remedy would lie to a superior Court in first two categories indicated above, it not for consideration before us. But if at all the law permits any recourse to a superior Court against the type of orders indicated in the first two categories, there should be no reason to think that anything in the provision would prevent the Court from considering the prayer of the applicant / accused for stay of the order, subject to the considerations to which the Court must advert under section 438(2) of the Code of Criminal Procedure. It would be a duty of the Court to ensure by imposing adequate restriction on the applicant/accused, that he did not get an opportunity to flee away or jump the interim bail, if already granted. It would be possible for the Court, in such an eventuality, to impose on the applicant / accused even a restriction as regards the time within which he should approach a superior Court and get the necessary orders. It must be appreciated that the entire section 438 is being substituted because the legislature had thought it fit to have it ensured that the accused/ applicant do not misuse the provisions of law for dodging the legal process or for evading themselves to be subjected to the due process of law. If this consideration is borne in mind, it would certainly be open to the Court to pass, depending upon the facts of each case, the appropriate orders. The same should be the guidelines even in the third contingency, namely, where the application for anticipatory bail is finally rejected.”

26. Thus, in the aforesaid judgment of this Court, the aspect sought to be specifically highlighted on behalf of the

applicant in the present application, has been deliberated upon and the above quoted observations have been made. There cannot be any two opinions about serious apprehension expressed on behalf of the applicant (accused) that if the interim protection from arrest operating in his favour during pendency of the application before the Sessions Court is not extended for a reasonable period of time, in the event the application is finally rejected upon hearing by the Sessions Court, there is every possibility of the applicant being arrested as he is obliged to remain present in the Sessions Court at the stage of hearing pursuant to direction given under Section 438(4) of the Cr.P.C. The moment the applicant (accused) is arrested, upon rejection of his application by the Sessions Court, he is clearly deprived of his right to move this Court i.e. the High Court for invoking the concurrent jurisdiction to seek anticipatory bail under Section 438 of the Cr.P.C. It is clear that in the absence of extension of the interim order of protection operating in favour of the accused during pendency of the application for anticipatory bail before the Sessions Court, the right available to the accused to move this Court i.e. the High Court will stand frustrated if he is arrested and such arrest will obviously be facilitated by the direction of the Sessions Court under

Section 438(4) of the Cr.P.C. This would not only be antithetical to the right of the accused to move the High Court under Section 438 of the Cr.P.C. but it would strike at the root of the right guaranteed under Article 21 of the Constitution of India.

27. This aspect also indicates that the Sessions Court needs to pass the order directing presence of the accused at the time of final hearing under Section 438(4) of the Cr.P.C., only in cases where the Court is of the opinion that there is possibility of the applicant absconding or that the presence of the applicant (accused) is necessary to ensure continued cooperation with the investigation even after final disposal of the application for anticipatory bail by the Sessions Court. The prosecution cannot be permitted to move applications under Section 438(4) of Cr.P.C. in a casual manner and the Sessions Court is also expected not to routinely allow such applications moved on behalf of the prosecution. This is because the expression “in the interest of justice” has to be construed in the interest of both the prosecution as well as accused and the Court is obliged to strike a balance between the interests of the two, while considering the application under Section 438(4) of the Cr.P.C.

28. It is not as if the Sessions Court is powerless in imposing further conditions while extending interim protection granted to an accused, while finally rejecting the application for anticipatory bail. The Sessions Court can insist upon continuing the conditions already imposed or imposing further stringent conditions in the interest of justice so that the abscondence of the accused is not only discouraged but obviated. At the same time, the accused is not deprived of an opportunity to place his case before the High Court by invoking concurrent original jurisdiction for seeking anticipatory bail under Section 438 of the Cr.P.C. Therefore, this Court finds that there is substance in the contentions raised on behalf of the applicant and that this application deserves to be disposed of by issuing appropriate directions in the matter.

29. This Court is conscious of the fact that the purpose for which the applicant had challenged the impugned order had served its purpose when interim relief was granted in this application by directing that if the Sessions Court passed any adverse order of rejection of anticipatory bail, the interim pre-arrest protection operating in his favour would continue

to operate for a period of 72 hours to enable the applicant to approach this Court. It is undisputed that the application for anticipatory bail of the applicant was finally disposed of and the limited interim relief granted by this Court served the purpose, insofar as applicant before this Court is concerned.

30. In any case, this Court has perused the impugned order. It is found that the applications at Exhs.7 and 8 moved on behalf of the Investigating officer and the Prosecutor did not divulge any reasons as to why presence of the applicant was necessary in the interest of justice at the time of final hearing of the application for anticipatory bail. The impugned order passed by the Court of Additional Sessions Judge at Nagpur, allowing the aforesaid applications at Exhs.7 and 8 also does not record any specific reason, other than the merely recording that a non-cognizable report was registered against the applicant at a Police Station. This Court is of the opinion that the applications moved on behalf of the Investigating officer and the Public Prosecutor at Exhs. 7 and 8 did not divulge sufficient reasons for seeking presence of the applicant at the time of final hearing of the application for anticipatory bail. Equally, the Court of Additional Sessions Judge, Nagpur, in the present case allowed the said

applications by the impugned order in a casual manner. Therefore, even though the purpose for which the present application was filed by the applicant was served by the interim order passed in his favour, this Court is of the opinion that the impugned order cannot be sustained.

31. In view of the above, the present application is disposed of as follows:

- a) The impugned order is quashed and set aside.
- b) In order to address the aforesaid apprehension of accused persons in the State of Maharashtra of the possibility of arrest upon remaining present before the Sessions Court pursuant to direction under Section 438(4) of the Cr.P.C. (Maharashtra Amendment), and rejection of their application for anticipatory bail, the following directions are issued:

- (i) The Prosecutor under Section 438(4) of the Cr.P.C. (Maharashtra Amendment) shall state cogent reasons while seeking the obligatory presence of the accused before the Sessions Court at the time of final hearing of the application for anticipatory bail.

- (ii) The Sessions Court shall consider such an application and pass a reasoned order as to why the presence of the accused is necessary, in the interest of justice, at the time of final hearing of application for grant of anticipatory bail.
- (iii) If the Sessions Court rejects the application for anticipatory bail upon final hearing and the accused is present before the Sessions Court in pursuance of directions given under Section 438(4) of the Cr.PC. (Maharashtra Amendment), the Court shall extend the interim protection operating in favour of the accused for a minimum period of three working days, on the same conditions on which interim protection was granted during pendency of the application for anticipatory bail or on such further conditions as the Sessions Court may deem fit, in the interest of justice.
- (iv) In cases where the Sessions Court deems it appropriate to grant extension of interim protection for more than three working days, it shall record reasons for the same and in any case, such extension of interim protection upon

existing conditions or further stringent conditions, shall not exceed a period of seven working days.

- (v) The accused shall abide by the conditions so imposed by the Sessions Court while granting extension of interim protection, failing which such interim protection shall cease to operate instantaneously.

32. Application stands disposed of in above terms.

JUDGE

MP Deshpande